

33

FILED
OCT 3 1942
CHARLES ELMORE CHAPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. **443**

INDIANA GAS & CHEMICAL CORPORATION,
Petitioner,

v.

KENTUCKY NATURAL GAS CORPORATION,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND
SUPPORTING BRIEF**

PAUL Y. DAVE,
HARVEY B. HARTSOCK,
Attorneys for Petitioner.

FRANK C. DAILLY,
GEORGE S. DAILLY,
JAMES E. LESH,
GUSTAV H. DONGUS,
1100 Hume-Mansur Building,
Indianapolis, Indiana,
Of Counsel.



INDEX

	Page
Citations	ii-iii
Petition for Writ of Certiorari.....	1-11
Summary Statement of the Matter Involved.....	1- 5
Jurisdiction to Review the Judgment.....	5
Questions Presented.....	6- 7
Reasons Relied on for the Allowance of the Writ.....	7-10
Prayer for Writ.....	11
Brief in Support of Petition for Writ of Certiorari.....	12-30
The Opinion of the Court Below.....	12
Jurisdiction to Review the Judgment.....	13
Statement of the Case.....	13-14
Summary of Argument.....	14-20
Argument	21-30

CITATIONS

Cases

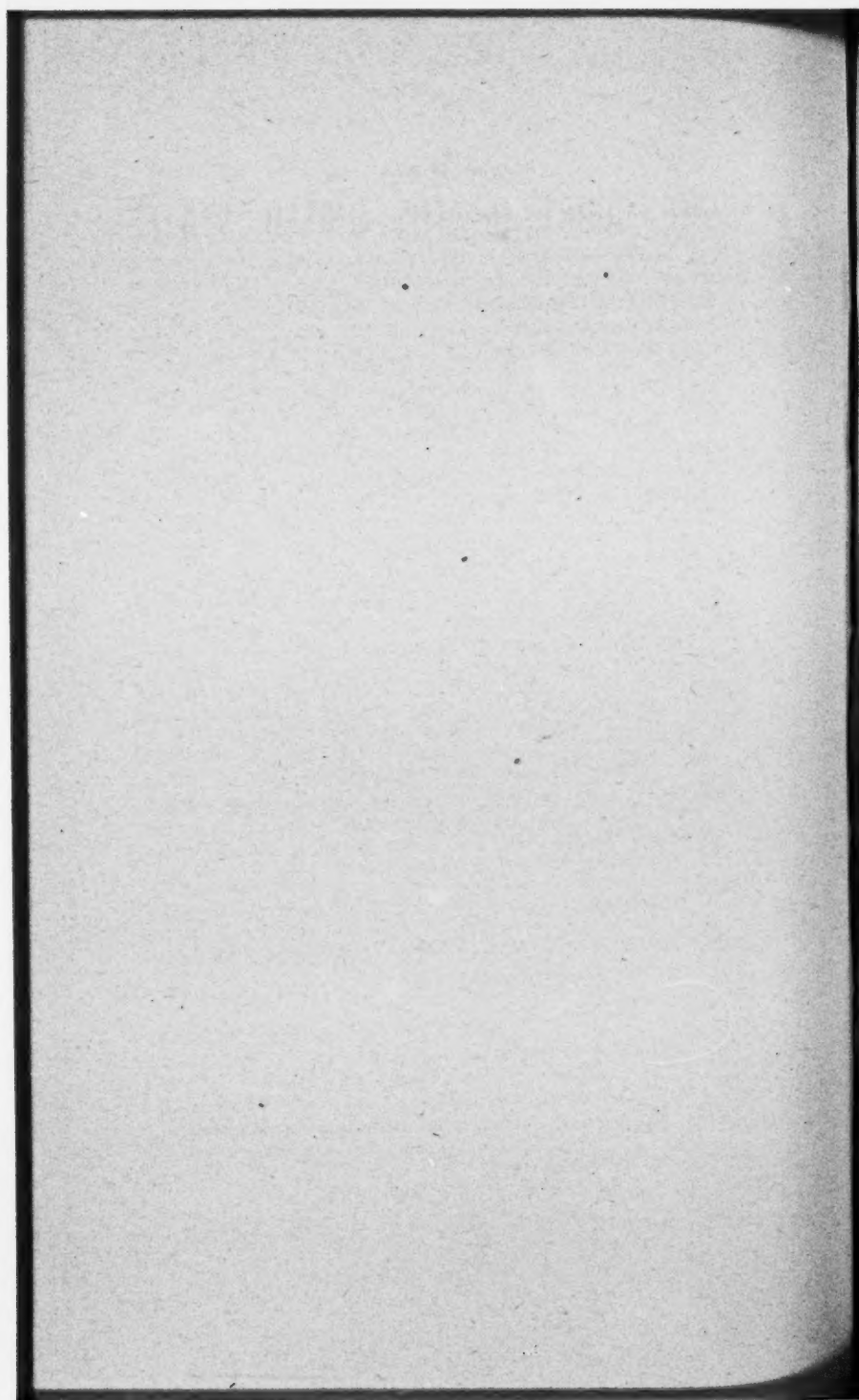
	Page
<i>Bu-Vi-Bar Petroleum Corporation v. Krow</i> (C. C. A. 10, 1930), 40 F. (2d) 488, 491; 69 A. L. R. 1295.....	9, 17, 24
<i>Busynski v. Luckenbach Steamship Company</i> (1928), 277 U. S. 226, 228.....	10, 20, 30
<i>Collins v. Riley</i> (1881), 104 U. S. 322, 327.....	9, 19, 26
<i>French v. Edwards</i> (1874), 21 Wall. 147, 151.....	9, 26-27
<i>Lagerloef Trading Co. v. American Paper Products Co.</i> (C. C. A. 7, 1923), 291 Fed. 947, 955.....	9, 17, 24
<i>Magic Packing Co. v. Stone-Ordean Wells Co.</i> (1902), 158 Ind. 538, 542.....	8, 15, 22
<i>Maryland Casualty Co. v. Jones</i> (1929), 279 U. S. 792, 796.....	10, 20, 30
<i>Miller v. Brooklyn Life Insurance Company</i> (1870), 12 Wall. 285.....	19
<i>National Pigments & Chemical Co. v. C. K. Williams & Co.</i> (C. C. A. 8, 1938), 94 F. (2d) 792, 796.....	10, 19, 29
<i>Norrington v. Wright</i> (1885), 115 U. S. 188, 212.....	8, 16, 22
<i>Rice v. Fidelity & Deposit Co.</i> (C. C. A. 8, 1900), 103 Fed. 427, 433.....	16, 23
<i>Ripley v. McClure</i> (1849), 4 Exch. 345, 359-360, 154 Eng. Rep. 1245.....	16, 23
<i>Roehm v. Horst</i> (1900), 178 U. S. 1, 11.....	17, 23
<i>Rubber Trading Company v. Manhattan Rubber Mfg. Co.</i> (1917), 221 N. Y. 120, 116 N. E. 789, 790.....	23
<i>Schreiber v. Butler</i> (1882), 84 Ind. 576, 580.....	8, 15, 22
<i>Scudder v. Union Natl. Bank</i> (1875), 91 U. S. 406, 413.....	14
<i>Skehan v. Rummel</i> (1890), 124 Ind. 347, 24 N. E. 1089.....	16, 22
<i>Sun Mutual Insurance Company v. Ocean Insurance Company</i> (1882), 107 U. S. 495, 500.....	9, 19, 28
<i>Tri-Bullion Smelting Co. v. Jacobsen</i> (C. C. A. 2, 1916), 233 Fed. 646, 649.....	9, 17, 24
<i>United Press Association v. National Newspaper Association</i> (C. C. A. 8, 1916), 237 Fed. 547, 554.....	9, 17, 24
<i>United States v. Pugh</i> (1878), 99 U. S. 265, 271.....	9, 19, 27

Texts

69 A. L. R., Annotation pp. 1303-1310.....	24
2 Beale, Conflict of Laws, Sec. 370.1, p. 1272.....	14
II Chitty, Pleading (10th Am. Ed. 1847), p. 264.....	22
5 Williston, Contracts (Rev. ed.), Sec. 1294.....	16
5 Williston, Contracts (Rev. ed.), Sec. 1334.....	17, 24
2 Williston, Sales (2nd ed.), Sec. 448, et seq.....	22

Statutes and Rules

	Page
Indiana Acts 1929, Chapter 192, Sections 42, 64, pp. 644, 654; Burns' Anno. Ind. Stat. 1933, Sections 58-302, 58-502.....	8, 13, 14, 15, 21
Section 274d, Judicial Code; U.S.C.A. Title 28, Section 400.....	6, 7, 19
R.S. Section 700; U.S.C.A. Title 28, Section 875.....	9, 18, 26
Rule 41, Rules of Civil Procedure.....	28
Rule 52, Rules of Civil Procedure.....	6, 7, 10, 18, 25
Rule 52(a), Rules of Civil Procedure.....	18



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

INDIANA GAS & CHEMICAL CORPORATION,	} No. _____
<i>Petitioner,</i>	
v.	
KENTUCKY NATURAL GAS CORPORATION,	
<i>Respondent.</i>	

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND
SUPPORTING BRIEF**

May it Please the Court:

Your petitioner, Indiana Gas & Chemical Corporation,
respectfully represents that:

I.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED**

This petition seeks review of the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered July 6, 1942, affirming a judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division. The opinion is reported as *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation*, 129 F. (2d) at page 17.

This suit was begun by respondent against the petitioner under Section 274d of the Judicial Code, as amended, (U.S.C.A. Title 28, Section 400) to obtain a declaratory judgment upon alleged rights growing out of a contract. R., p. 2. A money judgment was demanded upon two alternative theories together with an adjudication of the termination of the obligations of the parties under the contract. R., p. 7.

After trial without a jury, the Trial Court made a special finding of fact (R., pp. 45-71) and conclusions of law (R., pp. 71-72) upon which judgment (R., pp. 72-73) was rendered for respondent for \$10,941.02 upon one of the alleged grounds for damages together with a declaration of the termination of contractual obligations as prayed by respondent.

Questions One and Two

Respondent as seller and petitioner as buyer were mutually bound in a contract (R., pp. 13-24) for the purchase and sale of petitioner's "requirements" of natural gas. R., p. 46, Ex.D. pp. 13-24. Petitioner had agreed that these requirements would reach a certain minimum. R., pp. 14-16. Respondent asserted a right to cancel this contract for alleged misrepresentation inducing its execution and also for alleged breach by petitioner. R., pp. 47-48. Thereafter respondent, professedly to avoid "interference with public convenience", (R., p. 10), furnished these requirements but asserted a right to receive 5 cents per MCF in excess of the contract price, (R., p. 56) not only for the "requirements" but also for the agreed minimum quantities. R., pp. 56-57. Petitioner at all times asserted a right to have all promises of the contract performed. R., p. 56. Petitioner received its actual requirements and paid the

contract price of 30 cents per MCF, but failed to purchase the agreed minimum by the total of 181,982 MCF. R., p. 56. Prior to the time petitioner's "requirements" began to fall short of the minimum, respondent through a wholly owned subsidiary (R., p. 47) also offered natural gas for sale to others (R., pp. 61-64) in territory in which it had agreed not to sell during the life of the contract. R., p. 19.

On this phase of the controversy the complaint asserted:

(1) A right to cancel the contract for alleged breach, and consequent right to recover 5 cents per MCF (\$30,913.10) in excess of the contract price for gas actually delivered. R., p. 7.

(2) Alternatively, 30 cents per MCF for the alleged deficiency of 181,982 in the purchase of the minimum quantities prescribed in the contract. R., p. 7.

Respondent offered no evidence in support of its alleged right to cancel the contract (R., p. 48), but was awarded damages of \$10,941.02 because of petitioner's failure to receive at 30 cents per MCF 181,982 MCF of gas which respondent was only willing to furnish at 35 cents per MCF. R., pp. 72, 73. The Circuit Court of Appeals affirmed.

Questions Three and Four

Because of termination of petitioner's two sales contracts measuring the "requirements," the "requirements" for which the controversial deliveries were made (Par. (a), (d), R., pp. 14, 15) had ceased before trial (R., pp. 47, 49-53) and deliveries to supply these "requirements" had therefore ceased (R., p. 55), but the contract provided for the supply of gas for other "requirements" to arise in the future. Par. (b), (c), R., p. 15. Respondent assert-

ed that by proper construction of the contract the discontinuance of deliveries wholly terminated the parties' contractual obligations. R., pp. 43-44. The judgment of the Trial Court adjudged the contractual obligations terminated. R., p. 72. The facts were found specially, and the Trial Court's determination upon this subject was not stated as a finding of fact but expressly as a conclusion of law. R., p. 71. Petitioner objected to this conclusion, and specifically to the Court's failure to adjudge the contract in force (R., p. 72), and assigned error thereon. R., p. 75. The Circuit Court of Appeals nevertheless affirmed, saying: "We must assume that the evidence upon which the court based its conclusion in this respect, which is not in the record, justified the finding." R., p. 94.

Contract provisions and findings relied upon for decision of the question thus ignored are in the footnote.¹

¹ The contract provisions pertinent to the question of termination of the contract are as follows:

The petitioner-buyer's "requirements" of natural gas which the respondent-seller agreed to supply until 1947 (Eighteenth, R., p. 23) are described in paragraph First (R., pp. 14-16) as follows:

(a) Requirements for supplying manufactured gas to Indiana Gas Utilities Company under petitioner's contract with that company dated August 24, 1929. R., p. 14.

(b) Requirements for supplying Indiana Gas Utilities Company with mixed or straight natural gas, after "change-over" to that type of supply. R., p. 15.

(c) Requirements for underfiring coke ovens, and boilers, and making reformed gas, after "change-over" by Indiana Gas Utilities Company. R., p. 15.

(d) Requirements for supplying manufactured gas to Universal Gas Company under petitioner-buyer's contract with that company dated September 1, 1935. R., pp. 15-16.

Paragraph Second provides that all contracts by petitioner-buyer or its vendee for selling gas to industrial consumers, should be approved by respondent-seller, and fixes a price of 80 percent of resale price for all gas resold to industrial consumers "by Buyer or said Indiana Gas Utilities Company." R., pp. 16-17.

Paragraph Sixth provides in part:

"Sixth. Seller shall not be obligated to supply natural gas to Buyer for use or sale either directly or indirectly for any purpose not specified in Section First or Second hereof."

Petitioner-buyer's contract of September 1, 1935, with Universal Gas Company terminated September 15, 1940. Finding 5, R., p. 47. Its contract of August 24, 1929, with Indiana Gas Utilities Company terminated November 18, 1939. Finding 8, R., pp. 49-55.

Questions Five and Six

The complaint had tendered issue, joined by the answer, as to whether or not petitioner had in fact committed a breach of contract antecedent to respondent's repudiation. R., pp. 3-5, 27-28. Upon respondent's failure to support this issue, the Trial Court, over petitioner's objection (R., p. 72) ignored it (R., pp. 71-72), and error was assigned upon the Trial Court's failure to make a declaration in petitioner's favor. R., p. 75. The Circuit Court of Appeals likewise failed to determine this issue except inferentially, by its determination (erroneous, we believe, for other reasons) that petitioner was liable in damages.

II.

JURISDICTION TO REVIEW THE JUDGMENT

Jurisdiction of the District Court as a federal court was founded upon Section 24 of the Judicial Code (U.S.C.A. Title 28, Section 41 (1)) in that the parties were corporate citizens of different states, and the matter in controversy exceeded \$3,000. R., pp. 2, 45, 72. Jurisdiction of the Circuit Court of Appeals was founded on Judicial Code, Section 128 (U.S.C.A. Title 28, Section 223) and this Court has jurisdiction to review by virtue of Judicial Code Section 240, as amended, (U.S.C.A. Title 28, Section 347). The petition, the annexed brief and the record have been filed prior to October 6, 1942, and therefore within the three months prescribed by the Act of February 13, 1925, Chapter 229, Section 8, 43 Stat. 940, U.S.C.A. Title 28, Section 350, since the judgment of the Circuit Court of Appeals for the Seventh Circuit was entered July 6, 1942.

III.

QUESTIONS PRESENTED

(1) Whether or not, under applicable local law, the seller of goods under an executory contract of sale, may recover damages for the buyer's non-acceptance of a portion of the goods, although persistently unwilling to transfer the goods for the agreed price.

(2) Whether or not, under applicable local law, the seller of goods, under an executory contract of sale, having been guilty of an unqualified and unretracted repudiation, may nevertheless recover for the buyer's non-acceptance of a portion of the goods, because of the buyer's continued insistence upon performance of the seller's obligations.

(3) Whether or not, in a suit in a District Court of the United States under Section 274d of the Judicial Code (U.S.C.A. Title 28, Section 400), tried without a jury, where special findings of fact and separate conclusions of law were stated pursuant to Rule 52 of the Rules of Civil Procedure, and where one of the declarations sought and resisted was whether or not the parties' contractual obligations had been terminated, the Trial Court's conclusion of law, not stated as a finding of fact, that such obligations had terminated, and the consequent declaratory adjudication, was subject to review upon error duly assigned in the Circuit Court of Appeals, in the absence of the evidence.

(4) Whether or not, in a suit in a District Court of the United States under Section 274d of the Judicial Code (U.S.C.A. Title 28, Section 400), tried without a jury, where special findings of fact and separate conclusions of law were stated pursuant to Rule 52 of the Rules of Civil Pro-

cedure, and where one of the declarations sought and resisted was whether or not the parties' contractual obligations had been terminated, the Circuit Court of Appeals was required or permitted to treat as conclusive the Trial Court's conclusion of law that the contractual obligations of the parties had terminated, merely because the evidence was not in the record.

(5) Whether or not, in a suit for declaratory judgment under Section 274d of the Judicial Code (U.S.C.A., Title 28, Section 400), where plaintiff (respondent here) sought a declaration that a contract had terminated because of alleged breach by defendant (petitioner here), and issue was joined on the breach, and plaintiff failed at the trial to support this claim with evidence, the defendant was entitled to an adjudication denying plaintiff's right to terminate the contract for the alleged breach.

(6) Whether or not in a suit for declaratory judgment, tried without a jury, where special findings were made pursuant to Rule 52 of the Rules of Civil Procedure, the Circuit Court of Appeals was authorized to ignore error duly assigned upon the Trial Court's failure to adjudge and declare one issue in favor of defendant (petitioner), where plaintiff, having the burden, had failed to support its claim with evidence.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In deciding that respondent-seller, could recover from petitioner-buyer, for non-acceptance of a portion of the gas agreed to be bought and sold under the contract in suit, when respondent was at all times unwilling to

transfer title to this gas at the contract price, the Circuit Court of Appeals for the Seventh Circuit has erroneously decided an important question of the law of Indiana, involving the construction of Sections 42 and 64 of the Uniform Sales Act, (Burns' Annotated Indiana Statutes 1933, Sections 58-302, 58-502) in a way probably in conflict with the decisions of the Supreme Court of Indiana in *Schreiber v. Butler* (1882), 84 Ind. 576, 580, and *Magic Packing Co. v. Stone-Ordean Wells Co.* (1902), 158 Ind. 538, 542.

(2) If the provisions of Sections 42 and 64 of the Uniform Sales Act are not applicable, then the decision of the Circuit Court of Appeals, that the petitioner-buyer, was liable in damages for non-acceptance of a portion of the goods which respondent-seller, was at all times unwilling to transfer to petitioner at the contract price, is clearly in conflict with the decisions of the Supreme Court of Indiana in *Schreiber v. Butler* (1882), 84 Ind. 576, 580, and *Magic Packing Co. v. Stone-Ordean Wells Co.* (1902), 158 Ind. 538.

(3) If the question of petitioner's non-liability for damages under the facts found may be regarded as an open one under applicable Indiana law, then the decision that respondent-seller, although having repudiated the contract and been persistently unwilling to transfer title to the goods for the agreed price, might nevertheless recover for petitioner-buyer's non-acceptance of a portion of the goods, erroneously determined this question in conflict with the decision of this Court in *Norrington v. Wright* (1885), 115 U. S. 188, 212.

(4) If the question of petitioner's non-liability for damages under the facts found may be regarded as an open one under applicable Indiana law, then the decision that respondent-seller, although having repudiated the

contract and been persistently unwilling to transfer title to the goods for the agreed price, might nevertheless recover for petitioner-buyer's non-acceptance of a portion of the goods, because petitioner-buyer, at all times insisted upon its right to full performance, erroneously determined this question in conflict with the following decisions of other Circuit Courts of Appeals, namely:

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C.A. 10, 1930), 40 F. (2d) 488, 491;

and with its own decision in *Lagerloef Trading Co. v. American Paper Products Co.* (C.C.A. 7, 1923), 291 Fed. 947, 955.

(5) In refusing to review the sufficiency of facts specially found to support the judgment adjudging the contractual obligations of the parties terminated, and in assuming the correctness of the Trial Court's conclusion to that effect, which was expressly stated as a conclusion of law and not as a finding of fact, the Circuit Court of Appeals erroneously disregarded the provisions of R. S. 700, U.S.C.A. Title 28, Section 875, and of Rule 52 of the Rules of Civil Procedure, and rendered a decision in probable conflict with decisions of this Court in *Sun Mutual Insurance Company v. Ocean Insurance Company* (1882), 107 U. S. 485, 500; *United States v. Pugh* (1878), 99 U. S. 265, 271; *Collins v. Riley* (1881), 104 U. S. 322, 327, and *French v. Edwards* (1874), 21 Wall. 147, 151.

(6) If R. S. 700, U.S.C.A. Title 28, Section 875, and decisions thereunder are no longer controlling by virtue

of the Rules of Civil Procedure, or because this was a suit for declaratory judgment, then the Circuit Court of Appeals has decided in a way probably erroneous, an important question of Federal Law arising under the Rules of Civil Procedure, which has not been, but should be, decided by this Court, namely: Where the Trial Court has made special findings of fact and separately stated conclusions of law under Rule 52, does absence of the evidence from the record preclude review of the sufficiency of the facts found to support the conclusions of law and resulting judgment?

(7) In failing to review the action of the Trial Court in refusing to pass upon and adjudicate the issue joined by respondent-plaintiff's complaint and petitioner-defendant's answer as to whether or not petitioner had been guilty of a breach of the contract in suit justifying its termination by petitioner, the Circuit Court of Appeals decided *sub silentio* an important question under the Federal Declaratory Judgments Act, which should be settled by this Court, in a way believed to be erroneous and in probable conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *National Pigments & Chemical Co. v. C. K. Williams & Co.* (C.C.A. 8, 1938), 94 F. (2d) 792, 796.

(8) In failing to pass upon and decide the issue raised by petitioner's fifth assignment of error (Point 5, R. 5) that the Trial Court erred in failing to adjudge petitioner not guilty of breach of contract, the Circuit Court of Appeals rendered a decision in probable conflict with decisions of this Court in

Buzynski v. Luckenbach Steamship Company
(1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S.
792, 796.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full, true and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7960, entitled "*Kentucky Natural Gas Corporation, Plaintiff-Appellee, v. Indiana Gas & Chemical Corporation, Defendant-Appellant,*" and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case may be reversed by this Court, that the award of damages against your petitioner be set aside and that this Court hear and determine the issues left undetermined by said Circuit Court of Appeals or that said cause be remanded to the Circuit Court of Appeals with instructions to hear and determine such undetermined issues, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

INDIANA GAS & CHEMICAL CORPORATION,

By PAUL Y. DAVIS,

HARVEY B. HARTSOCK,

Attorneys for Petitioner.

FRANK C. DAILEY,

GEORGE S. DAILEY,

JAMES E. LESH,

GUSTAV H. DONGUS,

1100 Hume-Mansur Building,

Indianapolis, Indiana,

Of Counsel.